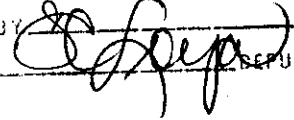


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COURT OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

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FILED BY FAX

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

SCOTT LEE PETERSON, et al.,

Defendant.

Case No. 1056770

REPLY TO THE DISTRICT
ATTORNEY'S OPPOSITION TO
MOTION FOR CHANGE OF VENUE

DATE: January 8, 2004
TIME: 9:30 a.m.
PLACE: Dept. 2

Defendant Scott Lee Peterson, by and through counsel, Mark J. Geragos, hereby
replies to the District Attorney's Opposition to Motion for Change of Venue.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

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4 *"When a defendant's life is at stake, the rule that all doubts be*
5 *resolved in favor of venue change, takes on particular*
6 *significance. Neither an accused whose life hangs in balance nor*
7 *the authorities charged with enforcing and administering the law*
8 *should be required to face the possibility of a second trial when, as*
9 *here, we face acute dangers to an impartial trial and when we can*
10 *avoid them by the simple expedient of a change of venue."*

11 *Martinez v. Superior Court (1981) 29 Cal.3d 574, 585 (emphasis added).*

12 *"Why courts should hesitate to grant a change of venue in a proper*
13 *case, I cannot understand...[Is] it feared the defendant would*
14 *escape if he were allowed a fair trial?"*

15 *People v. Suesser (1901) 132 Cal. 631, 635.*

16 The prosecution's opposition to the request for change of venue can be boiled down to
17 the old adage "sure we can give him a fair trial, then we will take him out and hang him." Few
18 defendants in recent history have been as demonized as Scott Peterson. For over a year, there has
19 rarely been a day without at least one (if not two) front page articles in the Modesto Bee about
20 this case and this defendant, along with several printed letters to the editor. Indeed, for weeks the
21 greatest number of letters to the editor at the Bee concerned this case and its prosecution.
22 Although the relentless press coverage has been national in scope, the national news coverage
23 pales in comparison to the saturation coverage in Stanislaus County and the immediate area.
24 Nevertheless, the prosecution now essentially contends that since Mr. Peterson cannot get a fair
25 trial anywhere, he might as well be tried and hung in Stanislaus County.

26 The mere fact that the district attorney even filed an opposition to Mr. Peterson's request
27 to change venue in this case is evidence that the district attorney has turned a blind eye to reality.
28 And now the prosecution engages in a cynical manipulation designed to deny Mr. Peterson a fair

1 trial. It not-so-subtly has raised the issue of cost to try to sway this Court to deny this motion.
 2 As the Court knows, the prosecution previously filed an expansive list of trial witnesses
 3 numbering seventy (70) people. Apparently not content to rely on the law, however, the
 4 prosecution – contemporaneous with the filing of its response – has now supplied the Court and
 5 counsel with an expanded list of trial witnesses that numbers over four hundred (400).
 6 Moreover, the prosecution has conveniently listed the witnesses' locales so as to further mislead
 7 the Court with phantom costs.^{1/}

8 As explained in the moving papers and re-articulated below, the facts presented here
 9 more than meet the legal threshold necessitating a change of venue. It bears emphasis that
 10 although Mr. Peterson has met his burden as to each of the factors this Court will assess in
 11 deciding the motion, ample prejudice as to a single factor can in itself warrant a change of venue.
 12 The bottom line here is that there is simply no way to conduct a fair trial of Scott Peterson in
 13 Stanislaus County, and the district attorney's contrary contention that residents of Stanislaus
 14 County can be fair and impartial and can set aside any preconceived opinions about Mr. Peterson
 15 would be laughable if a man's life were not at stake.

16 The district attorney primarily contends that a venue change from Stanislaus County is
 17 not necessary because jurors in other California counties would not be any less biased towards
 18 Mr. Peterson. This contention is factually inaccurate and, alternatively, legally insignificant.
 19 First, as the Court is no doubt aware, the only independent public opinion survey that has been
 20 done in this regard demonstrates not only that this matter cannot be fairly tried in Stanislaus
 21 County, but also that the improper bias against Mr. Peterson is significantly higher in Stanislaus
 22 County than in several other counties, including Los Angeles, Santa Clara and Alameda.
 23 Attached hereto as Exhibit A, is a true and correct copy of Change of Venue in People v. Scott
 24 Peterson, Stephen J. Schoenthaler. Moreover, as we explain more fully below, the survey upon
 25 which the district attorney relies – that of Ebbe Ebbesen (commissioned by the prosecution) – is
 26

27 _____
 28 ¹ If betting was legal we would wager that the prosecution will never call 70 witnesses at trial
 in this matter, and that if then questioned why it had listed 400 witnesses but only called 50, would
 say it "had streamlined its case in an effort to not further inconvenience the jurors."

1 invalid on its face, and should therefore not be given any weight by this Court. Ebbesen (1)
2 allowed the interviewer to inform the respondent that the district attorney's office is the party
3 responsible for the survey; (2) used several leading questions which produce a "demand effect"
4 under which the respondent attempts to please the interviewer; and, (3) with the active assistance
5 of the prosecutors, committed gross and outrageous violations of the Court's protective order.
6 See Declaration of Paul J. Strand, attached hereto as Exhibit B.

7 Second, and in any event, the determinative question here is whether the inflammatory
8 and prejudicial statements made in this case have had an especially salient effect on Stanislaus as
9 opposed to other counties. That is, even if the quantitative comparison between this county and
10 other counties was similar (it is not), the qualitative impact of the case on Stanislaus County
11 would not be, given its *local* salience. There is no dispute that residents of Stanislaus County
12 have formed strong opinions not only that Mr. Peterson is guilty, but also that the appropriate
13 punishment is death. In fact, even the inherently flawed survey commissioned by the prosecution
14 (see discussion below) points out that the percentage of people already in favor of the death
15 penalty in this case is off the charts in Stanislaus as opposed to Sacramento or Los Angeles.

16 This depth of pre-trial animosity is proved by the prosecution's own survey (needlessly
17 taken at taxpayer expense), but it is also obvious to any breathing human being in Stanislaus
18 County. Some misguided county residents have lashed out at Scott Peterson and his family, who
19 are treated as pariahs in the community and suffer relentless threats and verbal attacks.² As
20 noted, on one occasion a local crowd gathered outside the jail house in mob-like fashion
21 screaming "murderer" at Mr. Peterson, while other county residents have painted the words
22 "hang the bastard" on their vehicles. Scott Peterson's home has been vandalized on at least two
23 occasions and his warehouse office was actually rammed into by a truck, no doubt owned by yet
24 another resident who can be non-biased. Significantly, one of the hottest-selling t-shirts in
25 Modesto has a silk screen image of Scott Peterson's face with the logo "Modesto, a killer place

26
27 ²On November 19, 2003, the on-line version of the Modesto Bee (Modbee.com) reported a
28 call to the criminal division of the clerk's office threatening to "blow the place up" during a hearing
in this case. Spokesman Kelly Huston stated the sheriff's department has "become somewhat
accustomed to these."

1 to live.”

2 We do not suggest that this aberrant and deviant behavior demonstrated by some residents
 3 of Stanislaus County is symptomatic of behavior countywide, but it is most certainly emblematic
 4 of the personal and emotional connection Stanislaus County residents have towards this case.
 5 The county not only lost one of its beautiful daughters and sisters, but its residents also invested a
 6 significant amount of their personal time, money, and effort searching for Laci and Conner. It
 7 has been variously estimated that as many as twenty-five hundred (2,500) people participated in
 8 the search, many if not most of them local residents. It has also been estimated that
 9 approximately three thousand (3,000) residents attended Laci and Conner’s memorial service.
 10 Furthermore, as recently as two weeks ago, Stanislaus County residents held a three-day blood
 11 drive in honor of Laci and Conner Peterson. Finally, residents of Stanislaus County are
 12 suggesting to rename a park as Laci and Conner Park. Within the movement to rename the park
 13 is a vocal contingent that wants to make sure that the Peterson name is not used. What better
 14 collective recognition could there be of the community’s belief in Scott’s guilt? As such, with all
 15 of this documented, palpable bias, why create problems? As the Court stated in *Martinez*, why
 16 not “avoid them by the simple expedient of a change of venue.” *Martinez, supra*, 29 Cal.3d at
 17 585.

18
 19 **THIS COURT MUST TRANSFER VENUE OF THE PENDING**
 20 **MATTER TO ANOTHER COUNTY.**

21 The well-established law of this state mandates that a motion for a change of venue *must*
 22 *be granted* whenever there is *any doubt* that a fair trial can reasonably be held in the county in
 23 which a crime is to be tried. *Martinez, supra*, 29 Cal.3d at p. 577 (emphasis added). Here, the
 24 evidence raises a strong doubt about the likelihood of a fair trial in Stanislaus County. As
 25 already demonstrated by Mr. Peterson in his motion for change of venue, each of the five criteria
 26 required by the courts has been established.

27 1. **The Gravity of the Offense Weighs in Favor of a Change of Venue.**

28 The district attorney concedes (as he must) that the gravity of the offense in the instant

1 case – double capital murder – weighs heavily in favor of a change of venue.

2 2. The Nature and Extent of the Media Coverage Weighs Heavily in Favor of a
3 Change of Venue.

4 The prosecution has tried to sanitize the nature of the pretrial publicity in this case.
5 Contrary to the prosecutor's contentions, though, the publicity in the instant case is and has been
6 hostile and continuous, and has infected most if not all of Stanislaus County. It has been highly
7 prejudicial to Mr. Peterson either because of its outright hostility to him and sympathy for the
8 victims, or because it disclosed "factual" information which most of the time was inaccurate but
9 nonetheless likely to create a public belief in his guilt.^{2/}

10 As demonstrated in the motion for change of venue, hostile press coverage of Mr.
11 Peterson became widespread immediately after Laci's disappearance. For example, the dispute
12 over whether Mr. Peterson should be restrained in the courtroom and whether the court
13 proceedings should be televised was covered extensively in the local media. Indeed, Stanislaus
14 County Sheriff's spokesman, Kelly Huston, even expressed concerns that residents of Stanislaus
15 County would lynch Mr. Peterson at the time of his arrest. The response of the prosecution is to
16 mock Mr. Huston as having nothing to do with the case and seeking his fifteen minutes of fame.
17 In point of fact, Mr. Huston is the official spokesman for the agency charged with keeping the
18 peace generally in the County and specifically protecting Scott Peterson. If the Sheriff's
19 Department, the agency charged with that task of protecting the community and the accused, is
20 afraid of the possibility of the community lynching Scott Peterson one can better understand the
21 motivations of the prosecutors when they make their scurrilous attacks on this public servant.

22 However, while one arm of law enforcement was trying to put out the flames of
23 community passion another arm was fanning the flames. Detectives from the Modesto Police
24 Department greatly contributed to the parade of inflammatory publicity by telling the victim's
25

26 ^{3/}Ironically, as we further discuss below, the prosecution survey attached to the opposition is
27 replete with anti-defendant misstatements of the supposed evidence which was in turn carried in the
28 local press. Besides violating the protective order (discussed below) it is part of the continuing
relentless campaign by the prosecution and investigators to poison the jury pool in a death penalty
case.

1 family and friends, and the media, that Mr. Peterson had recently taken out a life insurance policy
 2 on Laci, was having financial difficulties, refused to let police search the house or the business,
 3 that the home on Covena reaked of bleach, the mop had Laci's blood and vomit on it, that Scott
 4 was unable to answer what he was fishing for and that Scott was not cooperative with the media
 5 or law enforcement. The detectives knew at the time that these statements were not true. When
 6 the Rochas expressed public support for Mr. Peterson on television the detectives promptly had a
 7 meeting with them in order to turn them against him. Not content with just poisoning the family,
 8 the police then orchestrated a made-for-TV prime time press conference starring the "the other
 9 woman." At the same time, the press fed the public a steady diet of coverage of the outpouring
 10 of grief and sympathy over Laci and Conner's death. Thousands of local residents attended
 11 Laci's funeral and memorial service. Benefits, concerts, and blood drives continue to this day,
 12 usually coinciding with court appearances by Scott.

13 In addition to the inflammatory publicity which aroused hostility toward Mr. Peterson, the
 14 prosecution's widespread public discussion of the evidence in this case was equally prejudicial.
 15 Here, as in the *Tidwell* case, "a good deal of the prosecution's case was presented out of court
 16 before the trial." *People v. Tidwell* (1970) 3 Cal.3d 50, 62. Thanks to the five months of
 17 relentless press releases and leaks from the prosecution team, the public was informed that Mr.
 18 Peterson went fishing the morning his wife disappeared, that he had recently purchased a boat
 19 that his family was not aware of, that cement was allegedly found in his boat, and that he was
 20 having an affair with Amber Frey. After the preliminary hearing, most, if not all, of the evidence,
 21 including transcripts of telephone conversations between Mr. Peterson and his alleged mistress,
 22 was made public. Most disgracefully, as recently as two weeks ago an actual transcript of an
 23 interview between Modesto Police and Mr. Peterson was leaked to the media by the
 24 prosecution.⁴

25
 26
 27 ⁴Contrary to the district attorney's contention, California law does not require that publicity
 28 about a pending criminal trial be either sensational or inflammatory in order to justify a change of
 venue. In *People v. Tidwell, supra*, 3 Cal.3d 62, the Supreme Court noted that "... in *Maine*, press
 coverage was neither inflammatory nor particularly productive of overt hostility," and rejected a
 contention that the pre-*Maine* standard for appellate review precluded a change of venue unless "

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As stated in *Corona v. Superior Court*,

“When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt. Indispensable to any morally acceptable system of criminal justice is a verdict based upon evidence and argument received in open court, not from outside sources. When community attention is focused upon the suspect of a spectacular crime, the news media’s dissemination of incriminatory circumstances sharply threatens the integrity of the coming trial. The prosecution may never offer the ‘evidence’ served up by the media. It may be inaccurate. Its inculpatory impact may diminish as new facts develop. It may be inadmissible at the trial as a matter of law. It may be hearsay. Its potentiality for prejudice may outweigh its tendency to prove guilt. It may have come to light as the product of an unconstitutional search and seizure. If it is ultimately admitted at the trial, the possibility of prejudice still exists, for it had entered the minds of potential jurors without the accompaniment of cross-examination or rebuttal. The goal of a fair trial in the locality of the crime is practically unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news

...inflammatory news articles [have] excite[d] community hostility almost to a fever[.]” *People v. Tidwell, supra*, at p. 69-70. Similarly, the Court of Appeal in *Corona v. Superior Court*, ordered a change of venue although pretrial publicity was “. . . voluminous but not inflammatory. . .” and “. . . portrayed Corona as a quiet, respectable family man and as a religious, hard working individual.” *Id.* at 877; see also *Martinez*, 29 Cal.3d 574 (change of venue ordered even though publicity not inflammatory or highly sensational). Thus, even factually-based crime reporting may prejudice a defendant by interfering with the protections of the judicial process. Nevertheless, this case has hardly been characterized by its factually-based crime reporting.

1 media."

2 *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 878.

3 While it may be true that the incident and some of its ramifications have received
4 publicity elsewhere, the impact on residents of Stanislaus County is unquestionably much greater
5 because of the unabated and total involvement of city officials, community leaders, and county
6 residents. All indications are that the community was shocked and horrified – and that it held
7 Scott Peterson responsible. The prosecution is now arguing that 12 residents of Stanislaus
8 County, knowing that they must go back into the community after reaching a verdict, can fairly
9 look at the evidence and not be influenced by what their friends and neighbors will think of a
10 verdict that will undoubtedly have major ramifications in Stanislaus County. Such a view is
11 naive at best. The reactions of the crowd that gathered to watch Mr. Peterson's arrest is just one
12 powerful indication of this general attitude. In a different county, however, the members of the
13 jury pool will not have been exposed to such extensive out-of-court reports about the details of
14 the case or about the victim's life and family. Nor will they have lived with this event as a local
15 tragedy, as have citizens of Stanislaus County. As the Supreme Court has noted, "In counties
16 geographically removed from the locale of the crime, lack of a sense of community involvement
17 will permit jurors a degree of objectivity unattainable in the locale of the crime itself." *Corona*,
18 24 Cal.App.3d at 883.⁵

19
20 ⁵The opinion in *Irvin v. Dowd* (1961) 366 U.S. 717, 727-728, is also instructive. In *Irvin*, the
21 United States Supreme Court held that a verdict of guilty by a jury which was not impartial violated
22 the defendant's constitutional rights. The Supreme Court held that the nature and extent of the
23 media coverage associated with this case, along with the strength of the opinions formed, prevented
24 jurors from setting aside their opinion and rendering a verdict based on the evidence presented in
25 court. The Court stated:

26 "Here the build-up of prejudice is clear and convincing. . . With such
27 an opinion permeating their minds, it would be difficult to say that
28 each could exclude this preconception of guilt from his deliberations.
The influence that lurks in an opinion once formed is so persistent
that it unconsciously fights detachment from the mental processes of
the average man. Where one's life is at stake – and accounting for the
frailties of human nature – we can only say that in the light of the
circumstances here the finding of impartiality does not meet
constitutional standards. . . No doubt each juror was sincere when he
said that he would be fair and impartial to petitioner, but

1 The prosecution attempts to use the Charles Manson case (*People v. Manson* (1976) 61
 2 Cal.App.3d 102) to bolster its contention that a change of venue would be futile because the
 3 media coverage of this matter has been national in scope. Indeed, the Opposition concludes:

4 As the *Manson* case prophetically predicted: "Modern means of
 5 news communication have taken away many of the reasons for the
 6 transfer of the cause celebre which may have existed fifty years
 7 ago." [cite] Additionally, when jurors up and down the state hold
 8 the same feelings 'in general,' there is no point in moving venue."
 9 (*People v. Venagas, supra*, 25 Cal.App.4th 1731, 1738.)

10 (Opposition at 19:23 - 20:2.)

11 A review of the relevant facts demonstrates that the People's reliance on *Manson* and
 12 *Venagas* (which, as the People note, relied on *Manson*) is misplaced. As the People point out,
 13 *Manson* involved "horrendous crimes [two separate killings at different locations](factor 1),"
 14 "aberrant/outcast defendants (factor 4)" and "famous/prominent victims (factor 5)." (See
 15 Opposition at 8:12-15.) Thus *Manson* is easily distinguished from the instant case in which
 16 there are not two killing sprees with blood-written messages as in *Manson*; Mr. Peterson is not an
 17 aberrant, outcast defendant presiding over a self-styled "family" living in a sex commune; Laci
 18 Peterson was neither famous nor prominent; and the killings did not occur at the home of a well-
 19 known Hollywood figure.

20 More significantly, however, while the *Manson* trial was not moved from Los Angeles
 21 County, the apparent reason was that the trial court, like the Court of Appeal, recognized:

22 [The] general acknowledgment that adversities of publicity are

23
 24 _____
 25 psychological impact requiring such a declaration before one's
 26 fellows is often its father. Where so many, so many times, admitted
 27 prejudice, such a statement of impartiality can be given little weight.
 28 . . . With his life at stake, it is not requiring too much that petitioner be
 tried in an atmosphere undisturbed by so huge a wave of public
 passion."

Id. at 727-728.

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considerably offset if trial is conducted in a populous metropolitan area. [Citations] Los Angeles County, with a population of 6,993,371 in 1971, was four times more populous than the second largest county in the state. A more metropolitan or heterogeneous area could not be found.

(*People v. Manson, supra*, 61 Cal.App.3d at 189.)

Implicit in this observation is the notion that in a case of massive publicity Los Angeles County will necessarily always be the venue of choice since the adversities of publicity are offset by a trial being conducted in a populous metropolitan area.

Additionally, the notion that jurors up and down the state (see above) hold the same feelings "in general" is absurd. The residents of Stanislaus County were the ones intimately involved with this case from day one. It was Stanislaus residents who initially helped comfort both families, it was Stanislaus residents who fanned out across Modesto to search for Laci, and it was Stanislaus residents who were most hurt and outraged by the revelation of Scott's relationship with Amber Frey.

Given the comprehensive response by Stanislaus residents to the initial disappearance of Laci it seems exceedingly likely that most, if not all, potential jurors either helped or knew someone who helped in the search for Laci. Potential jurors in Los Angeles County or otherwise remote from Stanislaus County are far less likely to have had such an intimate involvement with this matter and are certainly less likely to experience the visceral disgust with Mr. Peterson that has been manifested by certain Stanislaus residents.⁶ In fact, this depth of pre-trial animosity toward Mr. Peterson is proved by the prosecution's own survey. The percentage of people already in favor of the death penalty in this case is significantly higher in Stanislaus County as opposed to Sacramento or Los Angeles. While the defense is confident that if and when this case is tried in front of an unbiased jury that it will not reach the penalty phase (because Mr. Peterson is factually innocent), it is important to note that such high levels of prejudgment in punishment is held to be a critical factor weighing in favor of changing venue. As stated by the Supreme

⁶See Introduction above.

1 Court in *Fain v. Superior Court*,

2 "...the issue of whether defendant lives or dies is manifestly no less critical than
3 the issue of his guilt; and precisely because of the broader rules of admissibility
4 and the absence of standards to guide the jury in choosing the appropriate
5 punishment, a fair and impartial jury is no less essential at the penalty phase than
6 at the guilt phase. Concern for an unbiased penalty jury, indeed, lies at the heart
7 of Witherspoon distinguishing between the functions of the jury in finding guilt
8 and fixing penalty,"

9 "...the jury are instructed on the precise standards of law by which to decide the
10 issue of guilt [citations]; but in the penalty phase of a capital case,...the jury are
11 vested with absolute discretion to determine which penalty to impose [citations].
12 Thus jurors who may have read the press accounts...and perhaps formed opinions
13 on the murder charge could, under proper instructions, objectively decide whether
14 he was guilty...but such jurors are not reasonably likely to act with total
15 impartiality when called upon to make the essentially subjective determination in
16 wighing the penalties for first degree murder. The test enunciated in *Maine*, it
17 must be remembered, is not a showing of actual prejudice, but whether there is a
18 *reasonable likelihood* that a fair trial cannot be had in the present forum."

19 *Fain v. Superior Court* (1970) 2 Cal.3d 46.

20 **A. The Prosecution's Contention That The Publicity Is Attributable To**
21 **The Defense Is Both Irrelevant And False.**

22 The prosecution claims that:

23 The publicity in the instant case has to a great extent been caused
24 by and perpetuated by the defendant, the defense attorney and the
25 defense team.

26 (Opposition at 9:5-7.)

27 The above statement could only be made from one suffering from some sort of
28 institutional delusion or short term memory loss. The police were the ones who within hours

1 orchestrated a campaign to publically convict Scott Peterson. Det. Brocchini admitted at the
 2 preliminary hearing that he would rise at 6 a.m. to alert Scott and Laci's friends to stories carried
 3 by the Modesto Bee which he knew contained information that was false. The police
 4 orchestrated a press conference starring Amber Frey that was carried live on television in
 5 January, almost four full months before Scott was even arrested let alone arraigned in this matter.
 6 Before the current defense team was in place Modesto Police had held at least six (6) televised
 7 press conferences. But the above statement's factual inaccuracy is equaled by the legal infirmity
 8 upon which it rests.

9 The cases cited by the prosecution fail to establish the proposition that the "invited error
 10 doctrine" operates to preclude Mr. Peterson for requesting a change of venue. In fact, as noted by
 11 the court in *People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn3 (cited by the People), "the
 12 doctrine of invited error applies to estop a party from asserting the error when 'his own conduct
 13 induces the commission of error.' (6 Witkin, Cal. Procedure (2d ed. 1971)." Presumably the
 14 People are not implying that the Court has committed error prior to ruling on the motion for
 15 change of venue. Hence, there is no error triggering application of the "invited error doctrine."

16 Additionally, as DDA Harris is well-aware, the Rules of Professional Conduct permit
 17 counsel to make extrajudicial statements necessary to respond to and correct other extrajudicial
 18 statements. Considering that the Attorney General himself characterized this case as a "slam
 19 dunk," the defense has conducted itself in the manner any qualified counsel would under the
 20 circumstances present in this case. As such, the People's claim that the defense is somehow to
 21 blame is not only preposterous but farcical.⁷

22 Furthermore, it is the District Attorney's office that has engaged in a pattern of behavior
 23 designed to taint the Stanislaus County jury pool. For example:

- 24 1. District Attorney James Brazelton made a widely publicized
 25 statement that the prosecution would "open some eyes" during the

26
 27 ⁷This is particularly so in that current counsel was not even on the case until nearly five
 28 months after Laci Peterson disappeared, while the national coverage began almost immediately and
 certainly reached a high pitch when law enforcement encouraged Amber Frey to conduct multiple
 press conferences during which she identified herself as Mr. Peterson's lover.

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preliminary hearing;

2. The prosecution had no objection to keeping the hearing open to the public so members of the Modesto community could view the proceedings;

3. The prosecution intended to tamper with the jury pool with a patently defective survey prior to Mr. Peterson's having even filed a motion for change of venue;

4. The prosecution misrepresented to the Court that the venue survey participants would be instructed not to discuss the survey and that this instruction would be necessary since the prosecutor knew Ebbesen would be setting forth the prosecution's entire body of evidence, thereby implicating the Court's protective order;

5. The prosecution filed (unsealed) and published on the Internet the Ebbesen survey wherein Ebbesen, a prosecution witness subject to this Court's protective order, sets forth the entire body of the prosecution's evidence in flagrant violation of the protective order.

In light of the above, the People's contention that Mr. Peterson and the defense have somehow engaged in conduct precluding a change of venue must be rejected.

B. The Ebbe Ebbesen "Change of Venue Report" And Its (Unsealed) Filing With The Court Are An Admitted Violation of This Court's Protective Order.

On August 14, 2003, in open court, Deputy District Attorney David P. Harris stated that as to the participants in the People's survey:

They're also -- pursuant to the [proposed] order [lodged with the People's original motion to conduct a survey] if the Court grants it, that the jury commissioner's office would advise them not to communicate the contents of this, so any information that's in the survey that might be factual that might potentially implicate the Court's protective order, they would be ordered not to communicate. They would be

1 instructed not to share that with anyone else. It's something
2 that happens. We have to do this for the venue surveys
3 whether we do it by phone or whether we do it by the jury
4 commissioner.

5 Presumably this representation was made because the prosecution was familiar with the
6 fact that the proposed Ebbe Ebbesen procedure was not a "public opinion survey" as authorized
7 by *Maine v. Superior Court* (1968) 68 Cal.2d 375. Rather, the Ebbesen procedure involved
8 setting forth the prosecution's entire case as well as Ebbesen's amateurish and unfounded
9 speculation as to what the defense might argue.⁸ (As the Court will recall, Ebbesen was the
10 "expert" who devised the prosecution's earlier proposed survey that was tantamount to jury
11 tampering). In light of the fact that Ebbesen will be a witness,⁹ Ebbesen was clearly under the
12 purview of this Court's protective order. Nevertheless, contrary to the prosecution's
13 representation to the Court, the Ebbesen surveys contained no admonition to the participants not
14 to communicate the contents of the survey.

15 The prosecution's aiding and abetting Ebbesen in such a flagrant and comprehensive
16 violation of this Court's order is the epitome of so-called *Dustin* error.¹⁰ As such, and in
17 addition to any other remedies the defense might pursue, Mr. Peterson believes the immediate
18 sanctions for Ebbesen's (and the People's) total disregard of the protective order should be (1)
19 the striking of the Declaration of Dr. Ebbe Ebbesen (Exhibit 1 to Opposition); (2) the striking of
20 the document entitled "CA v Scott Peterson: Change of Venue Report" (Exhibit 1A to
21

22 ⁸ See People's Opposition to Motion for Change of Venue at Exhibit 1A at (1) Change of
23 Venue Survey - - Peterson Los Angeles, questions 14, 15, 16, 17, 18, and 19; and, (2) Change of
24 Venue Survey - - Peterson Stanislaus 12, 14, 16, and 18.

25 ⁹ See Opposition at 19:2-5.

26 ¹⁰ See *Dustin v. Superior Court* (5th Dist. 2002) 99 Cal.App.4th 1311. See also People's
27 August 13, 2003 "Opposition to Motion to Suppress Wiretap Audio Recordings" at 12 wherein DDA
28 Rick Distaso told the Court, "[t]his court can be assured that the Stanislaus County District
Attorney's Office and this prosecutor are well aware of the requirements of *Dustin v. Superior
Court*." Apparently the People believe violating an order of this Court in a death penalty case is not
a serious matter.

1 Opposition); and, (3) the preclusion of Ebbesen from testifying for the People.

2 **C. Even If The Court Does Not Strike The Ebbesen Report It**
3 **Should Be Disregarded Because Of Its Total Failure To Address**
4 **Relevant Legal Issues.**

5 Preliminarily, Mr. Peterson notes that the December 10, 2003 "Amended Motion to
6 Conduct Venue Survey" grossly misstates the law as to the scope of a "public opinion survey"
7 conducted pursuant to the California Supreme Court's opinion in *Maine v. Superior Court* (1968)
8 68 Cal.2d 375. Citing *Maine*, the Amended Motion does correctly state that "the People, as well
9 as the defense, are entitled to conduct a public opinion survey in preparation for a hearing on a
10 change of venue motion." (Amended Motion at 2:27 - 3:2.) However, the People then state that:

11 It is imperative in such a survey that the parties determine if
12 prospective jurors are open to altering their opinions when
13 presented with a series of facts, as opposed to refusing to do
14 so because of pre-trial publicity. It is not that jurors be
15 ignorant of prejudicial publicity, or that they have not
16 formed an opinion concerning defendant's culpability. It is
17 only necessary that they be willing to set aside all
18 impressions and base their verdict only on the evidence
19 presented in court. (*People v. Harris*, (1981) 28 Cal.3d 935,
20 949.)

21 (Amended Motion at 3:5-13.)

22 Initially, Mr. Peterson notes that the response does not actually quote the *Harris* court.
23 Upon reading pages 949 - 950 of the Supreme Court opinion the reason for this failure to quote
24 becomes obvious - - the discussion the prosecution relies upon as being relevant to its "public
25 opinion survey" is actually a review of the *voir dire* in *Harris* and had no bearing on the analysis
26 of a motion for change of venue. See *Harris, supra*, at 950 ("[e]xamined under these guidelines,
27 the *voir dire* clearly indicated pretrial publicity did not have the effect of denying defendant his
28 right to a fair and impartial jury.")

1 When one reviews the Ebbesen documents it becomes apparent that the prosecution's
 2 misinterpretation of *Harris* is key to the prosecution's attempted validation of Ebbesen's voodoo
 3 psychology. The prosecution properly notes:

4 The California Supreme Court has repeatedly set out what
 5 steps a trial court should follow when trying to determine if
 6 a change of venue motion should be granted. As the court
 7 has said: [¶] "To make that decision , we examine five
 8 factors: the nature and gravity of the offense, the nature and
 9 extent of the news coverage, the size of the community, the
 10 status of the defendant in the community, and the popularity
 11 and prominence of the victim." (People v. Weaver (2001) 26
 12 Cal.4th 876, 905.)

13 (Opposition at 3:27 - 4:5.)

14 Rather than conduct a survey that would seek to facilitate the Court's review of the five
 15 relevant factors, Ebbesen's report is replete with irrelevant statements and psychobabble such as:

16 Most defense oriented change of venue surveys focus on two
 17 main issues: how many potential jurors in the local venire
 18 heard about the case and how many say that, based on what
 19 they heard in the media, they believe the defendant is
 20 guilty.¹¹

21 (Ebbesen report at 3.)

22 We attempted to collect evidence about the willingness of
 23 potential jurors in the three counties to assume that
 24 defendants who are on trial for murder are guilty by asking
 25 the following question:

26 (Ebbesen report at 3.)

27 _____
 28 ¹¹Rhetorically speaking, might this be because those issues are actually relevant to the legal
 test of a motion for venue change?

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In effect, we conducted a "mock" trial. Responses to our "mock" trial provide the ideal assessment of the potential prejudice of jurors.

(Ebbesen report at 6.)

In particular, we attempted to assess whether potential jurors could assume that Scott was innocent were the case presented by the prosecution a weak one.

(Ebbesen report at 6.)

One might argue that the former test is completely inadequate because it does not asses[s] the extent to which potential jurors would be willing to consider exculpatory evidence presented by the defense. Hostile feelings towards Scott might not affect the way in which potential jurors evaluate incriminating evidence but rather the extent to which they are willing to take into account exculpatory rebuttal evidence presented by the defense. We designed the second version of our survey to assess this issue. Rather than begin with a weak case and continuously add to it, in this version of the survey we began with a relatively strong case and then continuously 'whittled away' at the evidence by presenting more defense evidence. . .Because some might argue that the dichotomous decision (guilty, innocent) is too gross to pick up subtle effects of prejudice on judgments, we added a 'scalar' measure designed to assess the strength of each respondent's belief in Scott's guilt.

(Ebbesen report at 7.)

We performed the same analyses on the responses to our questions about whether the evidence was sufficient to prove

1 that Scott was guilty of killing Connor. As noted earlier, we
 2 included these questions to test whether hostile feelings
 3 would emerge when this obviously emotional issue was
 4 decided.

5 (Ebbesen report at 22.)

6 Performing "mock trials" and testing whether "hostile feelings" might be created in
 7 potential jurors might be appropriate activities for Ebbesen's Psychology 162 class (see
 8 <<http://www-psy.ucsd.edu/%7eeebbesen/psych16298/162Syllabus99.html>>) which Ebbesen
 9 describes as:

10 [U]nusual in that it tries to combine two very different fields
 11 by adopting the point of view of one (Empirical Social
 12 Psychology) and applying that to the other (the Legal
 13 System). Basically, we will examine issues about the
 14 behavior of people (remember that psychology is the
 15 scientific study of human behavior in the legal system.

16 (See Ebbesen web page "General issues" section)

17 Unfortunately for the prosecution, these activities are entirely improper as to this
 18 Court's determination of Mr. Peterson's change of venue motion. Nowhere in the five factors set
 19 forth above is there authority for conducting the type of voodoo science set forth in the Ebbesen
 20 report. The legal standard is clear and leaves no room for the consideration of such nonsense in
 21 determining whether Mr. Peterson's trial must be moved.¹²

22 Lastly, Mr. Peterson notes that Ebbesen and his report lack credibility in that Ebbesen
 23 states, "[i]n addition, the individuals who supervised and conducted the actual interviews were
 24 never told why I designed the survey the way I did nor what my expectations were regarding
 25

26 ¹²Mr. Peterson notes that the Ebbesen report seems to purport to measure factors that should
 27 not be considered except as to individual potential jurors during voir dire. Indeed, one might
 28 conclude that the Ebbesen report was conducted not for the purpose of opposing the motion for
 change of venue, but rather as a means by which the Prosecution could retain the services of a jury
 consultant, an expense that would not necessarily be approved by the Court or the taxpayers.

1 results," while the actual printed survey itself contains the following:

2 If you [survey participant] like, you can verify the
3 authenticity of the survey by calling District Attorney Dave
4 Harris at the Stanislaus County District Attorney's Office at
5 (209) 525-5550.

6 (See Ebbesen Report at 1 and Change of Venue Survey -- Peterson (Los Angeles and Stanislaus
7 Versions) at 1.)

8 It defies credulity to infer that the surveyors did not know why they were doing what
9 they were doing since DDA Harris was the contact point for people being surveyed. At a
10 minimum, Mr. Peterson urges the Court to view any statements or supposed "evidence" with
11 great suspicion in light of Ebbesen's willingness to defy this Court's order and Ebbesen's
12 willingness to make gross misrepresentations concerning his survey and report.

13 3. The Size of the Population of Stanislaus County Weighs in Favor of a
14 Change of Venue.

15 The prosecution contends that the size of Stanislaus County weighs in favor of denying
16 Mr. Peterson's motion. The district attorney argues that Stanislaus County has grown, and it is
17 now much more similar to Ventura County as discussed in *People v. Fauber* (1992) 2 Cal.4th
18 792. The prosecution contends that the *Fauber* court denied a defendant's request for a change
19 of venue based on the large size of that county. Not so. In denying defendant's request for venue
20 change, the *Fauber* court noted that the "case lacked the sensational overtones of other killings
21 that have been held to require a change of venue, such as an ongoing crime spree, *multiple*
22 *victims often related or acquainted*, or sexual motivation." *Id.* at 818, quoting *People v. Green*
23 (1980) 27 Cal.3d 1, 46 (emphasis added). The court further noted that the victim in the case was
24 not prominent and his death did not engender unusual emotion in the community. *Id.* It was
25 based on those factors that the Court in *Fauber* denied the motion for change of venue from
26 Ventura County. The facts of this case are precisely the opposite of those in *Fauber*. Unlike
27 *Fauber*, the instant case involves multiple victims who were related -- a mother and child. In
28 bold contrast to the facts in *Fauber*, Laci's death has engendered unusual emotion in the

1 community of unprecedented proportions. Finally, unlike *Fauber*, Stanislaus County is still
2 considered a relatively small county with a population of a little over 450,000 compared to over
3 600,000 in Ventura County.

4 As stated in *Odle v. Superior Court*, "the decision to require a change of venue turns not
5 on a mechanical measurement of the size of the county, but on an evaluation of the extent of the
6 publicity and the effect it probably had on the community. Population size is sometimes helpful
7 in judging that effect, there is no *per se* rule. Larger counties, for instance, may have newspapers
8 with wider circulation—and thus be just as infected by prejudicial pretrial publicity as a smaller
9 county with only a local press." *Odle v. Superior Court*, 32 Cal.3d 932, 953. The prosecution
10 admits that the Modesto Bee floods its readership with publicity about Mr. Peterson's case. In
11 fact, the Modesto Bee, along with its website ModBee, covers all aspects of Mr. Peterson's case
12 extensively. It is the largest paper in Stanislaus County, with a daily circulation of 84,000 and an
13 additional 12,000 on Sundays. Moreover, although the reported population figure for Stanislaus
14 County is a little over 450,000, that figure includes children and others ineligible to serve on
15 juries. The number of people in the potential juror pool is therefore much lower.

16 In any event, population size alone is not determinative. The Court of Appeal has taken
17 care to emphasize that "a large city may . . . also become so hostile to a defendant as to make a fair
18 trial unlikely." *Maine v. Superior Court*, 68 Cal.2d 375, 387; see also *Fain v. Superior Court*
19 (1970) 2 Cal.3d 46, 52. The Courts of Appeal have taken this possibility seriously, ordering
20 venue changes from Los Angeles County (*Smith v. Superior Court* (1969) 276 Cal.App.2d 145)
21 and San Mateo County (*Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623); see also *Powell*
22 *v. Superior Court* (1991) 232 Cal.App.3d 785 (order denying change of venue vacated because
23 immense size of the potential jury pool in Los Angeles not controlling in view of public opinion
24 survey reflecting preconceived attitudes). The key question is whether the size of the county can
25 effectively neutralize the negative impact of the prejudicial publicity. Here, it cannot. The
26 relatively small size of the community relative to the extensive prejudicial local media coverage
27 militates strongly in favor of a change of venue.

28 4. The Status of the Victim and the Status of the Accused Weigh in Favor of

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a Change of Venue.

The prosecution erroneously contends that "any prominence achieved by a victim through news reports following the crime does not support a change of venue." (Opposition at 15:27.) The case law not only clearly states otherwise but has coined the phrase "posthumous celebrity." In *Odle*, the Supreme Court carefully noted that "...by virtue of the events and media coverage after the crime, [the victim] became a posthumous celebrity[.]" 32 Cal.3d at 940. As in *Odle*, the victim in the instant case was portrayed by the media as an "...object of a great deal of sympathy and interest." *Id.* at 941. Laci has been uniformly portrayed as a "beautiful daughter" of Modesto, with good looks and an infectious smile. Her funeral and memorial service was attended by thousands and received county-wide coverage. Well-publicized benefits were conducted, and federal legislation was proposed to make killing a fetus a federal crime. A number of stories, again largely concentrated in Stanislaus County press, reported a wrongful death action brought by Laci's mother.

In sharp contrast, however, the manner in which Mr. Peterson has been pictured in the media is such as to "...arouse hostility towards the defendant." *Fain v. Superior Court* (1970) 2 Cal.3d 46, 51. Mr. Peterson has consistently been portrayed as an adulterous fertilizer salesman in dire financial difficulty who is an outsider to Modesto. Consequently, these factors militate strongly in favor of a change of venue.

5. The Presence of Vast Political Overtones Weighs in Favor of a Change of Venue.

It is well-settled that, "political factors have no place in a criminal proceeding, and when they are likely to appear, as here, they constitute an independent reason for a venue change." *Powell v. Superior Court*, at 800, citing *Maine v. Superior Court, supra*, at 398.

Notwithstanding the fact that public figures and entities, including the then Governor, Attorney General, the District Attorney, the County Board of Supervisors, the Sheriff's Department, state senators and other various legislators, have made public and often negative comments regarding this case, the prosecution contends that "there are no political overtones in this case." The prosecution is gravely mistaken. Political overtones have encompassed this case

1 since Laci's disappearance. Aside from the political factors discussed in Mr. Peterson's moving
 2 papers, Assemblyman Dave Cogdill relied on false rumors and supposed "inside" information
 3 about this case to push changes in insurance laws. In fact, after signing Assembly Bill 1083,
 4 former Governor Gray Davis stated that "the nation was shocked when Laci Peterson and her
 5 unborn son were brutally killed." Thus, one cannot dispute the existence of vast political
 6 overtones in this case. Political considerations have had the effect of magnifying and prolonging
 7 the dissemination of sensational and prejudicial publicity regarding this case.

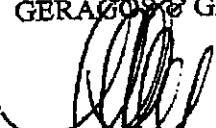
8
9 **CONCLUSION**

10 "Every person charged with a criminal offense is entitled to a trial free of the
 11 'unacceptable risk. . .of impermissible factors coming into play.'" *Powell v. Superior Court*
 12 (1991) 232 Cal.App.3d. 785, 802. The publicity in Northern California surrounding this case has
 13 been detailed, extensive, and inflammatory. It is readily apparent that a fair and impartial trial
 14 cannot be had in Stanislaus County. As such, Mr. Peterson respectfully requests that this Court
 15 grant his Motion for Change of Venue.

16
17 Dated: January 5, 2004

Respectfully submitted,
GERAGOS & GERAGOS

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19 By:



MARK J. GERAGOS
 Attorney for Defendant
 SCOTT LEE PETERSON